United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1889

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff-Appellant,

—against—

PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., and GAZOCEAN FRANCE,

Defendants-Appellees,

and

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, *et al.*,

Defendants.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

This is an appeal by plaintiff from a final judgment entered June 25, 1974, dismissing this action as to each of defendants-appellees, pursuant to Rule 41(b), Fed. R. Civ. P., for failure to prosecute.

Since the issues presented by this appeal are substantially the same as to each defendant-appellee, the defendants-appellees submit this brief jointly for the convenience of the Court.

Issues Presented

1. Where for more than four years a plaintiff deliberately fails to direct service of a summons and complaint upon certain defendants, is it an abuse of discretion for the district court to dismiss the action as to those defendants for failure to prosecute?

2. Where a plaintiff deliberately fails to direct service of a summons and complaint upon certain defendants while proceedings are pending between the plaintiff and other defendants in the same action, and where the pending proceedings bear on the plaintiff's claim against the defendants which have not been served, is it an abuse of discretion for the district court to dismiss the action as to those defendants for failure to prosecute?

3. Where a plaintiff's deliberately piecemeal service upon defendants would result in the indefinite suspension of proceedings on the merits of its action, five years after commencement, while the newly-served defendants contest jurisdiction, is it an abuse of discretion for the district court to dismiss the action as to the newly-served defendants for failure to prosecute?

Statement of the Case

The complaint in this action alleges violation of various sections of the United States antitrust laws (A-8, 9, 23, 26-7)* in connection with the transportation of vinyl chloride monomer (A-9-26). Plaintiff filed the complaint on September 25, 1969, and simultaneously directed the U.S. Marshal to serve the complaint upon only two of the six named defendants (A-46).**

Plaintiff made no effort to serve defendants-appellees Petromar Societe Anonyme ("Petromar"), Mundo Gas, S.A. ("Mundo"), Gazocean International, S.A. ("Gazocean International") and Gazocean France until December, 1973, more than four years after the complaint was filed (A-31, 46-7, 63).*** It is uncontested that plaintiff knew, well before commencing its action, where Petromar, Gazocean France and Gazocean International could be found for service (A-31, 46-7); from the complaint itself it is apparent that plaintiff knew where Mundo could be found (A-19-20).

The proceedings between plaintiff, SAGA, and Gazocean U.S.A. during the four years between filing the complaint and any attempt at service upon defendants-appellees (sometimes referred to herein as "the dismissed defendants") are listed on two-and-one-half pages of the docket

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* "A" refers to pages in the Appendix.

** The originally served defendants were Societe Anonyme de Gerance et D'Armement ("SAGA"), and Gazocean U.S.A., Inc. ("Gazocean U.S.A.").

*** Each of defendants-appellees is incorporated outside the United States—Petromar and Gazocean France in France (A-32, 7), Gazocean International in Switzerland (A-7), and Mundo in Panama (A-63).

of the district court (A-2-4) and include a decision by this Court affirming the denial of a motion by SAGA to dismiss this action for want of jurisdiction over the subject matter.* The ground for that motion was that since plaintiff is a Swiss corporation, and SAGA a French corporation, this action is barred by a Swiss-French treaty requiring all commercial actions between citizens of those two countries to be brought in the courts of the nation of the person against whom the action is filed. Since Gazocean France and Petromar are also French corporations, had SAGA's motion been granted upon the ground asserted, this action would necessarily have been barred as to Gazocean France and Petromar as well.

In addition to that motion, prior to any effort to serve the dismissed defendants, plaintiff and SAGA engaged in discovery in which the dismissed defendants took no part.**

When plaintiff attempted service upon the defendants-appellees in December, 1973, each of them moved, pursuant to Rule 41(b), Fed. R. Civ. P., for an order dismissing this action as to it for failure to prosecute (A-28, 43, 60). Judge Knapp granted each motion in an opinion filed February 27, 1974 (A-114).

Fourteen weeks later, on June 5, 1974, plaintiff moved, pursuant to Rule 54(b), Fed. R. Civ. P., for an order directing entry of final judgment (A-5). The motion was granted and final judgment dismissing the complaint as to defendants-appellees was entered on June 25, 1974 (A-118). Thereupon, plaintiff appealed to this Court from the final judgment and moved for a preference on its appeal. On July 16, 1974, this Court denied that motion.

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* 451 F.2d 727 (1971), *cert. denied*, 406 U.S. 906 (1972).

** Further discovery proceedings have followed the dismissal of these defendants from the case; in these proceedings, too, the dismissed defendants have taken no part.

ARGUMENT

Orders dismissing an action for failure to prosecute are within the discretion of the district court, and should not be reversed except upon a clear showing of abuse of discretion. Where, as here, a plaintiff deliberately decides not to direct service of the summons and complaint upon certain defendants for more than four years, it would have been an abuse of discretion *not* to dismiss the action.

The test is whether the plaintiff was diligent in prosecuting its action. In this case, there has been an absolute and conscious failure of prosecution as to the dismissed defendants.

Moreover, by deliberately deciding not to direct service upon the dismissed defendants while relevant proceedings were taking place between plaintiff and the served defendants, plaintiff interfered inexcusably with the dismissed defendants' rights to defend.

Finally, plaintiff's deliberately piecemeal service would—if this Court reverses the dismissal of the action as to defendants-appellees—effectively require the district court to suspend all proceedings on the merits to take up jurisdictional questions which should have been presented and decided at the outset of the litigation, nearly five years ago.

I.

Plaintiff's Deliberate Failure for Over Four Years to Direct Service of Its Summons and Complaint Upon the Dismissed Defendants Was Grounds for Dismissal.

The order dismissing this action as to defendants-appellees was based upon Rule 41(b), Fed. R. Civ. P., which provides in pertinent part:

> "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him."

District courts are allowed wide discretion to dismiss actions under this rule. In this Court's words, "such dismissal is largely a matter of the judge's discretion." *Taub* v. *Hale,* 355 F.2d 201, 202 (2d Cir. 1966), *cert. denied,* 384 U.S. 1004 (1966). "Dismissal of a lawsuit for inaction is clearly within the sound discretion of the federal district court. [citation omitted] Absent a clear abuse of discretion by the district court, we will not reverse the court's order of dismissal." *Spering* v. *Texas Butadiene & Chemical Corp.,* 434 F.2d 677, 680 (3d Cir. 1970). See also *Link* v. *Wabash Railroad Co.,* 370 U.S. 626, 633 (1962).

Here there can be no question of abuse of discretion. On the contrary, the circumstances in this case are at least as compelling as those in which this Court has held that "it would have been a gross abuse of discretion" *not* to dismiss an action for failure to prosecute. *Messenger* v. *U.S.,* 231 F.2d 328, 331 (2d Cir. 1956).

If anything, the plaintiff's failure in *Messenger* was less egregious than plaintiff's failure herein. In *Messenger,*

the plaintiff had served his complaint against the United States upon the U.S. Attorney for the Eastern District of New York, pursuant to Rule 4(d)(4), Fed. R. Civ. P. However, through what his attorney called an "oversight," he neglected to serve the complaint by registered mail upon the U.S. Attorney General, and thus for more than four years failed to complete the dual service required under Rule 4(d)(4) in actions against the United States.

Here, in contrast, no service whatever was either made or attempted on the dismissed defendants for over four years. The lack of service was not inadvertent, nor does plaintiff contend that it was. And here, as in *Messenger,*

> ". . . the defendant never served any notice of appearance or pleadings and, although certain proceedings preliminary to trial were taken by the plaintiff and another defendant, who is not a party to this appeal, the appellee was not notified of nor did it participate in them." 231 F.2d at 329.

Messenger established the rule that failure to serve a complaint is failure to prosecute, and that an unreasonable delay in service entitles a defendant to dismissal under Rule 41(b), whether or not the defendant establishes specific prejudice from the delay. In Judge Medina's words,

> "Under Rule 41(b), a motion to dismiss may be granted for lack of reasonable diligence in prosecuting. [citations omitted] The operative condition of the Rule is lack of due diligence on the part of the plaintiff—not a showing by the defendant that it will be prejudiced by denial of its motion." 231 F.2d at 331.

Since *Messenger,* other opinions have endorsed the rule that unreasonable delay in service, even without an inde-

pendent showing of prejudice, is grounds for dismissal. In *Taub* v. *Hale, supra,* this Court upheld dismissal *sua sponte* of an action in which the complaint had not been served for over three years. "There was also a long and unnecessary delay in service which would, in itself, be adequate grounds for dismissal . . . absent factors which would afford justification or excuse." 355 F.2d at 201.

In *Richardson* v. *United White Shipping Co.,* 38 F.R.D. 494 (N.D. Cal. 1965), a motion to dismiss was granted after service was delayed for over two years. Although it observed that "prejudice to the defendants is obvious", the court said, "The essential question, however, is whether there has been a failure to prosecute the action with reasonable diligence." 38 F.R.D. at 495. There was such a failure, the court held, for *even though some methods of service had been attempted,* others had not.

Of course, while no showing of prejudice is required, four years' delay inevitably brings prejudice.

> "Delay is almost always prejudicial to one side or the other. It tends also to result in an inordinate use of the court's time, to the prejudice of other litigants. The probability of prejudice to defendants upon whom process is not served for a long time is particularly great." *Pearson* v. *Dennison,* 353 F.2d 24, 28 (9th Cir., 1965).

Certainly, over the course of four years, witnesses' memories may fail, or the witnesses themselves disappear, and documents become lost or difficult to find. In short, all the factors which prompted Congress to enact a four-year statute of limitations for actions brought under the antitrust

laws (15 U.S.C. § 15-b) operate with equal force when process is not served for more than four years.*

Plainly, plaintiff's neglect herein entitled defendants-appellees to dismissal of this action, as to them, for failure to prosecute. The first step in the prosecution of a cause of action, once filed, is service of the summons and complaint upon the defendants. A failure to make such service is the most basic failure to prosecute.

Judge Knapp found that "plaintiff has produced not the slightest rational excuse for its more than four year delay in effecting service on these defendants" (A-116). We submit that there can be no excuse for such inaction when a plaintiff, who knows for four years how service could be made, refuses to take the necessary steps.

Plaintiff's brief on appeal offers neither justification nor explanation for its deliberate lack of prosecution.** In fact,

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* It is no answer to assert that the defendants may or should have known of the pendency of the action, despite the lack of service. A potential defendant may likewise be aware of the existence of a possible claim against him; but that will not excuse the plaintiff who fails to commence his action within the statutory period, even if the failure is inadvertent. Having deliberately failed to serve process upon defendants-appellees, plaintiff is now in no position to say that appellees have not been prejudiced by its deliberate procrastination (cf. *Whitman* v. *Walt Disney Productions, Inc.,* 263 F.2d 229 (9th Cir. 1958)).

** Plaintiff's unsupported statements to the contrary notwithstanding, Rule 41(b) dismissals are available in antitrust actions. See, e.g., *S & K Airport Drive-In, Inc.* v. *Paramount Film Distributing Corp.,* 58 F.R.D. 4 (E.D. Pa. 1973), *aff'd,* 491 F.2d 751 (3d Cir. 1973); *U.S.N. Co.* v. *American Express Co.,* 55 F.R.D. 31 (E.D. Pa. 1972); *Delta Theatres, Inc.* v. *Paramount Pictures, Inc.,* 398 F.2d 323 (5th Cir. 1968), *cert. denied,* 393 U.S. 1050 (1969); *Sandee Mfg. Co.* v. *Rohm & Haas Co.,* 298 F.2d 41 (7th Cir. 1962); *First Iowa Hydro Electric Cooperative* v. *Iowa-Illinois Gas and Electric Co.,* 245 F.2d 613 (8th Cir.), *cert. denied,* 355 U.S. 871

the major part of plantiff's brief completely ignores its own willful neglect, and instead campaigns for the alleged merits of its claims, citing, for support, its self-serving interrogatory answers and letters (e.g., B-6-14, 22-24).* While those merits, whatever they may be, are irrelevant to this appeal, we nevertheless observe that good claims are ordinarily prosecuted. Plaintiff's decision not to serve these defendants says more about the merits of the claim than its belated plea for relief from the consequences of that decision.

In any event, suffice it to note that nothing has occurred in this case which prevented plaintiff from obtaining service of the summons and complaint upon defendants-appellees. SAGA's vigorous defense, about which plaintiff complains (B-30), can hardly serve as an excuse for plaintiff's failure to serve the summons and complaint on the remaining defendants.

Plaintiff's plea that it may now be barred from pressing new claims against defendants-appellees (B-22-30) is irrelevant to the issues before this Court. The question under *Messenger* and subsequent cases is whether there was diligent prosecution of plaintiff's claims against defendants-appellees. Plaintiff's voluntary decision not to prosecute those claims cannot be excused merely because it now fears

(1957); *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F.2d 825 (10th Cir. 1948). (At least in *U.S.N. Co.*, the plaintiff (like plaintiff herein) alleged continuing violations of the antitrust laws; since the plaintiffs in *First Iowa* and *Shotkin* sought injunctive relief, evidently they too alleged continuing violations. The other opinions here cited do not reveal the nature of the claims alleged.)

* "B" refers to pages in the Brief for Plaintiff-Appellant.

that the consequences of that failure will be more serious than, apparently, it once thought.*

Indeed, it is particularly inappropriate for this plaintiff, which from the outset of this litigation has been oblivious to the interests served by the statute of limitations, to complain that that statute may at last bar some of its claims. When the Court of Appeals for the Eighth Circuit held recently that the Clayton Act's statute of limitations does not of itself require prompt service of process on antitrust defendants, it had no intention of sanctioning deliberate and extended delays in service. "It appears to us," said that court, citing this Court in *Messenger* v. *U.S.*, *supra*, "that Rule 41(b) provides adequate protection against unreasonable delay in serving process or prosecuting the suit." *Moore Co. of Sikeston, Mo.* v. *Sid Richardson Carbon & Gas. Co.*, 347 F.2d 921, 923 (8th Cir. 1965). If that court's reliance was misplaced—if a plaintiff can refuse to direct service of its complaint for four years after filing *without* subjecting its claim to dismissal under Rule 41(b)—then statutes of limitations are meaningless.

* In any case, plaintiff's contention that it should not be barred from pressing *new* claims against defendants-appellees is hardly a reason for reviving the *September, 1969* complaint. That complaint alleges antitrust violations as early as December, 1968 (A-17-18). An action filed now could not claim damages for antitrust violations taking place before July 1970; even one filed last December (see B-23) could not have claimed damages for violations before December, 1969. 15 U.S.C. § 15-b. Thus a new action filed now or in December, 1973, could not claim damages for any act alleged in the complaint at issue on this appeal.

II.

Plaintiff's Deliberately Piecemeal Service Upon the Defendants Was Disruptive of Ordinary Judicial Procedures and, Quite Apart from the Inordinate Length of the Delay of Service, Was Grounds for Dismissal.

This action has not, as plaintiff notes (B-30), been held in abeyance during the nearly five years since it was filed. Plaintiff served two defendants almost immediately; they appeared, and have defended their position ever since. In particular, SAGA argued before the district court, and again before this Court, a motion to dismiss based upon a treaty between France and Switzerland. The argument advanced by SAGA would have required dismissal of this action not only as to SAGA but as to Petromar and Gazocean France—like SAGA, French corporations. Petromar and Gazocean France had a right to be heard upon that motion, and plaintiff deliberately deprived them of that right.*

Whether the paths traversed by this litigation over the past five years are the same as those it would have followed had defendants-appellees been parties, no one can now say. But that does not justify the course plaintiff has taken, or excuse its willful delay. If plaintiff intended to assert a common claim against all of the defendants, then the dismissed defendants had a right to participate in the

* Plaintiff notes that Gazocean U.S.A., a company affiliated with Gazocean France, did not participate in the argument on SAGA's motion although it is a defendant and had been served. But Gazocean U.S.A. is, of course, a U.S. corporation (A-8), and had no standing to join in SAGA's motion. Its position, therefore, affords no indication of the position which Gazocean France would have taken on that motion.

preparation of a defense against that claim from the very beginning, and Judge Knapp so found (A-116).

Moreover, the addition of the dismissed defendants at this late stage would place an unnecessary burden upon the other defendants and constitute an unjustifiable imposition upon the district court. Reversal of the order dismissing the complaint as to defendants-appellees would present new jurisdictional issues to the court below (since all the dismissed defendants are foreign companies), undoubtedly delaying proceedings on the merits of this action.

Finally, discovery on the merits of this lawsuit has now advanced between plaintiff and the originally served defendants. Even if, *arguendo,* plaintiff were ultimately successful on the jurisdictional issues, the dismissed defendants, not having participated in the proceedings for five years, would have to initiate their own discovery to develop the facts necessary for their individual defenses.

In short, the effects of plaintiff's extraordinary delay cannot be erased. Plaintiff may not now like the consequences of its deliberate omission, but it cannot disown them.

CONCLUSION

The judgment appealed from should be affirmed.

Respectfully submitted,

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